AMBANK (M) BHD

v.

KT STEEL SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
[CIVIL APPEAL NO: J-02-351-2007]
7 MARCH 2011

BILLS OF SALE: *Definition - Lease agreement - Whether equipment lease agreement a genuine lease agreement or a loan agreement void under s. 4 Bills of Sale Act 1950 - Distinction between a hire purchase transaction and a loan agreement - True nature of transaction/agreement - Facts of case as a whole - Similar unlicensed money-lending transactions to be discouraged*

CONTRACT: *Lease - Financing facilities - Equipment lease agreement - Whether a genuine lease agreement or a loan agreement void under s. 4 Bills of Sale Act 1950 - Distinction between a hire purchase transaction and a loan agreement - True nature of transaction/agreement - Facts of case as a whole - Similar unlicensed money-lending transactions to be discouraged*

HIRE PURCHASE: *Lease agreement - Financing facilities - Whether equipment lease agreement a genuine lease agreement or a loan agreement void under s. 4 Bills of Sale Act 1950 - Distinction between a hire purchase transaction and a loan agreement - True nature of transaction/agreement - Facts of case as a whole - Similar unlicensed money-lending transactions to be discouraged*

In this appeal by the appellant/plaintiff against the decision of the High Court dismissing its claim against the respondents/defendants, the sole issue for determination was whether an Equipment Lease Agreement entered into between the plaintiff and the first defendant was a genuine lease agreement or a loan agreement void under the Bills of Sale Act 1950 for non-registration under s. 4 thereof. The first defendant had purchased equipment from M&M Greaves Machinery Atlas Works ('M&M Greaves') pursuant to a Contract of Sale Agreement. The first defendant then applied to the plaintiff for financing facilities. The

A plaintiff approved the application and the Equipment Lease Agreement was subsequently executed. In the instant appeal, the first defendant contended that the Lease Agreement was not *bona fide*. The appellant, however, submitted that the first defendant defaulted and sought restructuring, not because of a dispute as to B intention that it was a loan agreement, but because the first defendant lacked the money to pay.

Held (dismissing the appeal with costs)
Per Abdul Wahab Patail JCA delivering the judgment of the C court:

(1) The law provides for a distinction between a hire purchase transaction and a loan transaction. A hire purchase transaction is not a financing transaction whereas a loan transaction is a money-lending transaction and is specifically regulated by D legislation to require licensing. Without a license, the loan transaction is illegal, null and void. Hence, the true nature of the transaction in this case must be determined. (para 14)

(2) The Contract of Sale Agreement between the first defendant E and M&M Greaves was a sale and purchase agreement and not an agreement to sell. It was not the plaintiff's case here or below that it was an agreement to purchase and not a purchase by the first defendant. The first defendant was unequivocally stated to be the buyer. The equipment lease F transaction was then sought, obtained and structured after the first defendant's purchase. The plaintiffs' submissions, on the facts, focused entirely on the acts and results of the structuring of the transaction as an equipment lease but overlooked that the first defendant had purchased the G equipment, and no amount of "deeming" would change that fact. (para 15)

(3) It may seem that in the upshot the first defendant obtained an unconscionable advantage over the plaintiff as a result. H Upon consideration, the apparently unfair result and the threat of similar advantage being taken in future transactions would discourage similar transactions and ensure that the objects of the law be achieved against unlicensed money-lending. Accepting the plaintiff's approach would only encourage I equipment and other lease transactions that are not *bona fide* leasing transactions but are in fact money-lending transactions. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Dalam rayuan ini oleh perayu/plaintif terhadap keputusan Mahkamah Tinggi menolak tuntutannya terhadap responden-responden/defendan-defendan, isu tunggal untuk ditentukan adalah sama ada suatu Perjanjian Sewaan Alatan yang dimeterai oleh plaintif dan defendan pertama adalah perjanjian sewaan yang betul atau perjanjian pinjaman yang tidak sah di bawah Akta Bil Jualan 1950 kerana tidak didaftarkan di bawah s. 4 Akta tersebut. Defendan pertama telah membeli alatan dari M&M Greaves Machinery Atlas Works ('M&M Greaves') menurut suatu Perjanjian Kontrak Jualan. Defendan pertama kemudiannya memohon kepada plaintif bagi mendapatkan kemudahan kewangan. Plaintif meluluskan permohonan tersebut dan Perjanjian Sewaan Alatan telah kemudiannya dilaksanakan. Dalam rayuan semasa, defendan pertama menghujahkan bahawa Perjanjian Sewaan tersebut tidak *bona fide*. Perayu, walaupun begitu, menghujah bahawa defendan pertama telah melanggar perjanjian dan cuba menyusun semula, bukan disebabkan suatu pertikaian mengenai niat bahawa ia adalah perjanjian pinjaman, tetapi kerana defendan pertama tidak mempunyai wang untuk membayar.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Undang-undang menyediakan bagi suatu perbezaan di antara transaksi sewa beli dan suatu transaksi pinjaman. Transaksi sewa beli bukan suatu transaksi kewangan sementara transaksi pinjaman adalah suatu transaksi pinjaman wang dan dikawal khususnya oleh perundangan untuk memerlukan perlesenan. Tanpa lesen, transaksi pinjaman adalah menyalahi undang-undang, batal dan tidak sah. Oleh itu, sifat sebenar transaksi dalam kes ini mesti ditentukan.

(2) Perjanjian Kontrak Jualan di antara defendan pertama dan M&M Greaves adalah perjanjian jual beli dan bukan perjanjian untuk menjual. Ia bukanlah kes plaintif di sini atau mahkamah bawah yang ia adalah perjanjian untuk membeli dan bukan suatu pembelian oleh defendan pertama. Defendan pertama jelas dinyatakan sebagai pembeli. Transaksi sewaan alatan kemudiannya dituntut, diperolehi dan disusun selepas pembelian defendan pertama. Hujahan plaintif, berdasarkan fakta, memfokus keseluruhannya atas tindakan dan akibat

penyusunan transaksi sebagai sewaan alatan tetapi tidak mengambil perhatian bahawa defendan pertama telah membeli alatan, dan berapa banyak "anggapan" tidak akan menukarkan hakikat tersebut.

(3) Ia nampaknya pada kesudahannya defendan pertama memperolehi suatu kelebihan yang tidak adil ke atas plaintif sebagai akibatnya. Selepas ditimbangkan, keputusan yang nampaknya tidak adil dan ancaman bahawa kelebihan serupa diambil dalam transaksi masa depan akan menghalang transaksi serupa dan menentukan bahawa objek undang-undang dicapai terhadap pinjaman wang yang tidak berlesen. Penerimaan pendekatan plaintif hanya akan menggalakkan transaksi alatan dan sewaan lain yang bukannya transaksi penyewaan bona fide tetapi sebenarnya transaksi pinjaman wang.

Case(s) referred to:
Malayan Credit Ltd v. Mohamed Kassim [1965] 1 LNS 111 ***(refd)***

Legislation referred to:
Bills of Sale Act 1950, s. 4

For the appellant - Hargopal Singh; M/s Hargopal Singh & Co
For the respondents - S Palanivel (S Surendran with him); M/s Palani Aishah & Co

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-520-1999(1)]

[Editor's note: For the High Court judgment, please see AmFinance Bhd v. KT Steel Sdn Bhd & Ors [2008] 1 CLJ 290.]

Reported by Suresh Nathan

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant/plaintiff appealed against the decision of the High Court given at the Johor Bahru High Court on 28 March 2007 dismissing the plaintiff's claim against the defendants after a trial wherein the parties agreed to proceed by way of witness statements and dispensing with cross-examination and re-examination.

[2] It was also agreed that the sole issue for determination was whether the Equipment Lease Agreement dated 20 March 1997 entered into between the plaintiff and the first defendant was a genuine lease agreement or a loan agreement void under the Bills of Sale Act 1950 for non-registration under s. 4 thereof.

Brief Background

[3] The first defendant purchased the Equipment from M&M Greaves Machinery Atlas Works pursuant to a Contract of Sale Agreement dated 1 September 1996. The purchase price and the terms of payment were as expressly stated therein.

[4] The first defendant applied on 27 September 1996 to the plaintiff for financing facilities which was approved by the plaintiff through the letter of offer dated 12 October 1996. The first defendant and the plaintiff executed an Equipment Lease Agreement on 20 March 1997. On the same day the second, third and fourth defendants executed the guarantee documents.

The Decision Of This Court

[5] Having heard the parties, this Court dismissed the appeal, confirmed the decision of the High Court and awarded costs to the respondents in the sum of RM10,000.

The Grounds Of Decision

[6] The evidence for the appellant, commencing from the Letter of Offer of 12 October 1996 until August 2000 placed before the Court are consistent with the claim that the intention of the parties was to enter into a Lease Agreement. A letter dated 17 May 2006 by the first respondent, that "Presently our rental (leasing) facilities with MBf Finance is under NPL but we would like to seek MBf Finance to restructure the leasing so that we can survive and continue servicing the facility. With the restructuring, the project will have a better chance of survival." shows that even up to May 2006 the first respondent viewed that the arrangement between the parties was a lease agreement.

[7] In his witness statement Dr. Kanniappan, the Managing Director of the first respondent and the sole witness for the respondents herein denied the Lease Agreement was a *bona fide* Lease Agreement, prompting counsel for the appellant to submit before us:

A 1.2.28 Furthermore, Dr. Kanniappan, the managing director of the First Defendant and the sole witness for the Defendants, having written and signed all the relevant letters and documents on behalf of the First Defendant including the Equipment Lease Agreement, the Board Resolution and thereafter the letters of 17.05.2000 and 28.08.2000 cannot then testify (in Answer to Q26) that the Plaintiff was never the owner of the Equipment and (in Answer to Q29) that the First Defendant did not at any time request for a leasing of the equipment and (in Answer to Q28) that the agreement dated 20.03.1997 was for the money lent by the Plaintiff to the First Defendant.

[8] Appellant's counsel's submission at paras. 1.2.3, 3.2 and 3.3 however betrays there was a further dimension:

1.2.3 The following salient terms in the said Letter of Offer are important in determining the intention of the parties:

(a) The First Defendant was described as "Lessee";

(b) The facility was described as "'Deposit Lease";

(c) The repayment was described as "monthly rental";

(d) A residual value of the equipment was fixed at RM234,000.00

(e) The First Defendant (Lessee) was appointed as the Plaintiff's agent to order the equipment;

(f) Any payment made by the First Defendant (Lessee) to the dealer/manufacturer was deemed to have been made on the Plaintiff's behalf for which the Plaintiff agreed to reimburse the First Defendant (Lessee);

(g) Upon expiry of the lease, it could be mutually renewed for the remaining commercial useful life of the equipment

(h) Parties were to sign an Equipment Lease Agreement wherein the stamp duty was to be paid by the First Defendant (Lessee) and was to be calculated at RM5.00 per thousand of the total rentals payable.

[9] It was submitted that these terms were accepted by a board resolution on 30 October 2006 of the first respondent signed on its behalf by the second, third and fourth respondents; the agreement, entitled "Equipment Lease Agreement" signed on 20 March 1997 was written as a Lease Agreement and is a

superceding and entire agreement cancelling in all respects all previous arrangements, agreements and undertakings; disbursement voucher of bank shows a debit to leasing account; payment from the account was made to Multi-Purpose Bank Berhad to settle the Letter of Credit and was not disbursed to first respondent; and the notice of demand described the first respondent as lessee.

[10] It was also submitted:

> 3.2 Their contention that the First Defendant entered into a Contract of Sale dated 01.09.1996 with the Supplier necessitated the inclusion of clause 16 in the said Letter of Offer dated 12.10.1996 that the First Defendant shall be the agent of the Plaintiff and any monies paid by the First Defendant to the Supplier would be deemed to have been paid on behalf of the Plaintiff for the purposes of the lease and which monies will be reimbursed to the First Defendant.
>
> 3.3 It also necessitated to include Article 37 in the said Equipment Lease Agreement that the lease agreement embodies all the terms and conditions between the parties and supersedes and cancels in all respects all previous arrangement, agreements and undertakings whether written or oral.

[11] In concluding his oral submissions, counsel Mr. Hargopal Singh submitted that the first respondent defaulted and sought to restructure because it had no money to pay, and not because of dispute as to intention that it was a loan agreement.

[12] It is clear acknowledgment that the equipment had been purchased by the first respondent from the seller, M&M Greaves Machinery Atlas Works, and that the parties worked together after the purchase to structure an equipment lease transaction where in fact the hirer was in fact the purchaser subsequently made to appear to be the hirer. Thus, the parties included terms to convert the purchase by the first respondent who obviously required financing, to put in terms to deem the purchase by the first respondent to be a purchase by the appellant as principal. That the purchase by the first respondent was made to appear to be a purchase by the first respondent as agent for the appellant is incontrovertible. The evidence before the court showed the arrangements were only between the appellant and the respondents, while the seller M&M Greaves Machinery Atlas Works proceeded with its sale under the sale and purchase

agreement with the first respondent. No evidence was placed before the court that the sale to the first respondent was novated or replaced with a sale to the appellant who then leased the equipment to the first respondent.

[13] On the face of it, one might ask why it should matter when the appellant and the first respondent agreed to have the transaction between them appear to be an Equipment Lease Agreement and not a loan transaction. If the issue whether the transaction or agreement is an equipment lease or a loan is one that is solely of a contract between the parties, it might not have mattered.

[14] But the issue arises because the law provided for a distinction between a hire purchase transaction and a loan transaction. In an equipment leasing, even though the hirer chooses the equipment, the equipment is sold to the "financier", who purchases the equipment and causes it to be delivered to the hirer for monthly lease payments. See *Malayan Credit Ltd v. Mohamed Kassim* [1965] 1 LNS 111. It is recognised as not a financing transaction. On the other hand, a loan transaction is a money-lending transaction and is specifically regulated by legislation to require licensing, and without a licence, the loan transaction is illegal null and void. Hence, in order to determine the true nature of the transaction rather than merely to see what the parties sought to make it appear to be, it is essential that the facts as a whole should be considered.

[15] The Contract of Sale Agreement signed on 1 September 1996 between the first respondent and the seller M&M Greaves Machinery Atlas Works is a sale and purchase agreement and not an agreement to sell. It is not the appellant's case here or below that on 1 September 1996 it was an agreement to purchase and not a purchase by the first respondent. The first respondent is unequivocally stated to be the buyer. The application for a leasing loan was made on 27 September 1996, and the offer was made on 12 October 1996. The equipment lease transaction was thus sought, obtained and structured after a purchase by the first respondent. The submissions for the appellant focused entirely on the acts and results of the structuring of the transaction as an equipment lease. It however overlooked that the first respondent had purchased the equipment, and no amount of "deeming" would change the fact the first respondent had purchased the equipment.

[16] The focus by the appellant to defend the transaction as a leasing transaction, and avoiding it being termed as a loan transaction, is somewhat strange as the facility was then offered under the name MBf Finance Bhd, unless it was not at the time licensed to give loans.

[17] It may seem that in the upshot the first respondent obtains an unconscionable advantage over the appellant as a result. Upon consideration, we hold the conclusion that the apparently unfair result and the threat similar advantage might be taken in future transactions, would discourage similar transactions and ensure that the objects of the law be achieved against unlicensed money-lending. To accept the appellant's approach will only encourage equipment and other lease transactions that are not *bona fide* leasing transactions but are in fact money-lending transactions.

[18] For the above reasons, we dismissed the appeal.